IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2197 OF 2007

IN

SUIT NO. 3610 OF 2003

ALONGWITH

NOTICE OF MOTION NO. 2198 OF 2007

IN

SUIT NO. 3609 OF 2003.

AMERICAN PRESIDENT LINES LTD. AND ORS. ... PLAINTIFFS.

VS.

THE BOARD OF TRUSTEES OF THE PORT OFBOMBAY & ORS. ... DEFENDANTS.

MR. RAHUL NAARICHANIA I/B. LITTLE AND CO. FOR THE PLAINTIFS.

MS. BHALEKAR I/B. MULLA & MULLA FOR THE DEFENDANTS.

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CORAM : A.A. Sayed, J.

DATE : December 20, 2007.

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P.C.

1. By consent, both the motions are taken up together for hearing and final disposal.

2. I have heard the the learned Counsel for the parties.

3. Both the Notices of Motion have been taken out by the Plaintiffs to set aside the two Orders, both dated 16th April, 2007, whereby the notices of motion Nos. 3404 of 2003 and 3405 of 2003 were dismissed for non-prosecution and for restoration of the said motions to file.

4. The learned Counsel for the Plaintiffs submitted that both these motions were listed for hearing on 16th April, 2007 and that the learned Counsel for the Plaintiffs had mentioned the matter at 3.00 p.m. in presence of the defendants' Counsel and requested for adjournment, as he was in some difficulty; however the Court rejected his request. When the matter was called out in regular course, the learned Counsel for the Plaintiffs who mentioned the matter at 3.00 p.m. was on his legs before the other Court and an assistant Advocate appeared in the matter and requested the Court that the matter may be kept back for some time as the Counsel appearing in the matter for the Plaintiffs was

on his legs before the other Court. The defendants' Counsel did not oppose the request. However, the Court asked the assistant Advocate to go on with the matter, to which the assistant advocate expressed her inability as she did not have instructions in the matter. The Court, however, dismissed both the notices of motion on account of non-prosecution.

5. It is submitted by the learned Counsel for the Plaintiffs that the Notices of Motion were dismissed without any hearing on merits and Plaintiffs would suffer great loss and prejudice if the orders of dismissal of the Notices of Motion are not set aside. The Plaintiffs have tendered an apology to the Court in the affidavit for the default in appearance which led to passing of the dismissal order. It is further stated that the balance of convenience is in favour of the Plaintiffs.

6. The short point which arises for my consideration is whether the Orders of dismissal of the Notices of Motion are required to be set aside and restored to file.

7. The learned Counsel for the Plaintiffs has relied upon a decision in case of FERTILISERS AND CHEMICALS TRAVANCORE LTD. VS. RAJKUMAR LINES LIMITED,

reported in 1969 BOMBAY LAW REPORTER, page 271, wherein it was held as follows :

> "Where the Plaintiff or their agents or their attorneys were not present in Court when their suit was called on for hearing and they were only represented by a junior counsel whose instructions were to ask for adjournment of the suit or to consent to adjournment asked for by the other side and he was unable to answer any questions asked by the Court with regard to the conduct of the suit, it was held that in the circumstances the plaintiffs could not be said to have "appeared" in Court within the meaning of that expression in O.IX, R.8 of the Civil Procedure Code.

It is further observed by the Court:-

> "Apart from that, we find that it is settled law that where parties are not personally present and are represented by pleaders, appearances by a pleader within the meaning of O.IX does not mean mere presence in Court. It means appearance by a pleader "duly instructed and able to answer all material questions relating to the suit" or by a pleader "accompanied by

some person able to answer all such questions" as stated in Order.V. R.1..."

. The learned Counsel for the Plaintiffs further drew my attention to the portion wherein the above judgment refers to a decision of the full bench Judgment of Calcutta High Court of six Judges which considered the meaning of the word 'appearance' in SATISH CHANDRA MUKERJEE VS. AHARA PRASAD MUKERJEE's case. The Full Bench had held that an application by a Counsel or pleader who is instructed only to apply for an adjournment, which is refused is not an appearance within the meaning of the Code of Civil Procedure.

8. Considering the principles laid down in the above Judgment, in my view, the appearance by the assistant advocate would not amount to appearance as such under the Code of Civil Procedure, particularly, when the junior assistant advocate had no instructions to conduct the matter or to argue the notices of motion. The respect or courtesy shown by the learned Counsel for the Plaintiffs in making a junior Advocate assistant appear in the matter before the Court to ask for the adjournment, when the matter was called out in its regular course instead of a "non-appearance" before the Court would not therefore, disentitle the Plaintifs from taking out the above Notices of Motions rather than the

Plaintiffs having to file Appeals against the impugned orders. It is also pertinent to note that the Orders dated 16th April, 2007 specifically state that the notices of motion were dismissed for " non-prosecution". It is also noted that on both the occasions i.e. when the matters were mentioned and when the matters were called out, the Defendants' counsel did not oppose the request of the Plaintiffs' Counsel/Advocate. Pertinently no affidavit-in-reply has been filed opposing the present Notices of Motions.

9. In the circumstances, in my view the sufficient cause has been shown to set aside the Orders dated 16th April, 2007, dismissing the said Notices of Motion. Consequently the Orders dated 16th April, 2007 dismissing the Notices of Motion Nos.3405 of 2003 and 3404 of 2003 are required to be set aside and the Notices of Motion restored to file.

10. In the result, both the notice of motions are made absolute in terms of prayer clause (a) of the Motions. No costs.

11. Let the Notices of Motion appear before the appropriate Court for hearing and final disposal.

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[A.A.Sayed, J.]